Madam Packiam Ramalingam v Badan Peguam Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S5–24–652 OF 1999
ABDUL MALIK ISHAK J
2 NOVEMBER 1999

Legal Profession *— Liability as officer of court — Breach of undertaking — Construction of undertaking — Payment out of compensation fund of Bar Council pending outcome of suit — Plaintiff's solicitors undertook to make refund of sum paid should plaintiff succeed in suit — Parties settled out of court — Whether out of court settlement came within parameters of terms of undertaking — Whether claim for interest of sum paid from compensation fund should be allowed*

The plaintiff deposited the original issue document of title of the property with her solicitor Mr Meredith Coelho who later absconded. The property had been transferred to Yen Seng Credit and Leasing Sdn Bhd who later transferred it to Siow Moon Seng. Messrs Skrine & Co filed an action in the High Court of Kuala Lumpur vide Civil Suit No S5-22-224-89 on behalf of the plaintiff and the civil suit cited Yen Seng Credit and Leasing Sdn Bhd, Siow Moon Seng and the Registrar of Titles, Selangor Darul Ehsan as the defendants. As the plight of the plaintiff came to the attention of the defendant, the defendant agreed to pay the plaintiff a sum of RM22,396.65 ('the sum') out of its compensation fund subject to the outcome of Civil Suit No S5–22–224–89. By a letter dated 2 June 1989, Messrs Skrine & Co requested the defendant to pay the compensation due to the plaintiff with the undertaking that if the plaintiff is successful in the case filed, Messrs Skrine & Co will ensure that the order obtained includes an order for payment of an equivalent sum back to the defendant from any money recovered from the suit. The defendant forwarded the sum. Civil Suit No S5–22–224–89 did not proceed to trial. The matter was settled out of court on 23 October 1996 whereby the plaintiff obtained a sum of RM150,000. The defendant sought for a refund of the sum inclusive of interest. The plaintiff filed an originating summons to declare that on a true and proper construction of the undertaking given by the plaintiff's solicitors, the defendant is not entitled to be paid the sum. The issue of interest of the sum also arose for the court's consideration.

Held, dismissing the application:

Messrs Skrine & Co must abide by their undertaking to the defendant. To say that the settlement out of court was outside the purview of the undertaking would pervert the course of justice. The undertaking was very clear in its terms. There was no necessity for adjudication and there was no need to proceed to full trial in order to be successful in the plaintiffs endeavour in regard to Civil Suit No S5–22–224–89. In drafting the settlement out of court, there was no attempt to

incorporate the requirement for payment of an equivalent sum back to the Malaysian Bar so that the plaintiff will not obtain double recovery (see p 166E–F). Section 80(13) of the Legal Profession Act 1976 states, inter alia, that the income derived from the compensation fund shall be exempted from income and all other taxes and there was thus no necessity to demand interest from M/s Skrine & Co (see pp 166I–167A).

[Bahasa Malaysia summary

Plaintif mendepositkan dokumen hak milik asal hartanah dengan peguamnya En Meredith Coelho yang kemudian melarikan diri. Hartanah tersebut telah dipindahkan kepada Yen Seng Credit and Leasing Sdn Bhd yang kemudian memindahkannya kepada Siow Moon Seng. Tetuan Skrine & Co telah memfailkan tindakan di Mahkamah Tinggi Kuala Lumpur melalui Guaman No S5–22–224–89 bagi pihak plaintif dan guaman tersebut menamakan Yen Seng Credit and Leasing Sdn Bhd, Siow Moon Seng dan Pendaftar Hak Milik, Selangor Darul Ehsan sebagai defendan-defendan. Oleh kerana kes plaintif telah dibawa ke perhatian defendan, defendan bersetuju untuk membayar plaintif wang berjumlah RM22,396.65 ('jumlah tersebut') daripada tabung pampasannya tertakluk kepada kesudahan Guaman Sivil No S5–22–224–89. Melalui surat bertarikh 2 Jun 1989, Tetuan Skrine & Co meminta defendan untuk membayar pampasan yang patut diterima plaintif dengan akujanji bahawa jika plaintif berjaya di dalam kes yang difailkan, Tetuan Skrine & Co akan memastikan bahawa perintah yang diperolehi adalah termasuk suatu perintah untuk pembayaran di dalam jumlah yang sama kepada defendan daripada apa-apa wang yang diperolehi daripada guaman tersebut. Defendan telah menyerahkan jumlah wang tersebut. Guaman Sivil No S5–22–224–89 tidak dibicarakan. Perkara tersebut telah diselesaikan di luar mahkamah pada 23 Oktober 1996 di mana plaintif telah memperolehi jumlah RM150,000. Defendan telah meminta pengembalian jumlah tersebut termasuk faedah. Plaintif telah memfailkan saman pemula untuk mengisytiharkan bahawa di atas penafsiran yang benar dan wajar akan akujanji yang diberikan oleh peguam plaintif, defendan tidak berhak untuk dibayar jumlah tersebut. Isu mengenai faedah jumlah tersebut juga timbul untuk pertimbangan mahkamah.

Diputuskan, menolak permohonan tersebut:

Tetuan Skrine & Co mestilah berpegang kepada akujanji mereka kepada defendan. Untuk mengatakan bahawa penyelesaian di luar mahkamah adalah di luar liputan akujanji akan menghalang perjalanan keadilan. Akujanji tersebut adalah jelas dari segi terma-termanya. Tiada keperluan untuk ia dihakimi dan tiada keperluan untuk ia terus ke perbicaraan penuh untuk memastikan kejayaan

usaha plaintif-plainitf berkenaan dengan Guaman Sivil No S5–22–224–89. Di dalam menderafkan penyelesaian di luar mahkamah, tiada usaha untuk memasukkan keperluan untuk membayar jumlah wang yang sama balik kepada Majlis Peguam Malaysia agar plaintif tidak akan memperolehi tuntutan berganda (lihat ms 166E–F). Seksyen 80(13) Akta Profesyen Undang-Undang 1976 menyatakan, antara lain, bahawa wang yang diperolehi daripada tabung pampasan akan dikecualikan daripada pendapatan dan semua cukai-cukai yang lain dan tidak terdapat keperluan untuk menuntut faedah daripada Tetuan Skrine & Co (lihat ms 166I–167A).]

Notes

For cases on breach of undertaking, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1464–1472.

Cases referred to

A Solicitor, Re [1966] 3 All ER 52, [1966] 1 WLR 1604 (refd)
A Solicitor, Re (1969) 113 Sol Jo 549 (refd)
A Solicitor, Re; ex p Hales [1907] 2 KB 539 (refd)
Allaway v Duncan (1867) 16 LT 264 (refd)
Alliance Bank v Tucker (1867) 17 LT 13 (refd)
Bateman, Re (1833) 2 Dowl 161 (refd)
Bentley & Anor v Gaisford & Anor [1997] 2 WLR 401 (refd)
Choe Kuan Him, Advocate & Solicitor, Re; T Damodaran v Choe Kuan Him [1976] 2 MLJ 207 (refd)
Clifton, Ex parte (1836) 5 Dowl 218 (refd)
D v A & Co [1900] 1 Ch 484 (refd)
FC, Re 1888 WN 77 (refd)
Gee, Re (1845) 2 Dow & L 997 (refd)
Hasleham v Young (1844) 5 QB 833 (refd)
John Fox v Bannister, King & Rigbeys [1988] 1 QB 925 (refd)
Jonesco v Evening Standard Co Ltd [1932] 2 KB 340 (refd)
Kearns, Re (1847)11 Jur 521 (refd)
Northfield v Orton (1832) 1 Dowl 415 (refd)
Peart v Bushell (1827) 2 Sim 38 (refd)
Peoples Parkway Development Pte Ltd v Ramanathan Yogendran [1991] 1 MLJ 325 (refd)
Pott v Stutely (1935) WN 140 (refd)
Silver and Drake v Baines [1971] 1 QB 396, [1971] 1 All ER 473 (refd)
T Damodaran v Choe Kuan Him [1979] 2 MLJ 267 (refd)
Thomson v Gordon (1846) 15 M & W 610 (refd)
Walker v Arlett (1831) 1 Dowl 61 (refd)
Watts, Ex parte (1832) 1 Dowl 512 (refd)
Williams, Re (1850) 12 Beav 510 ()
Udall v Capri Lighting Ltd [1988] QB 907, [1987] 3 All ER 262 (refd)
United Mining and Finance Corp Ltd v Becher [1910] 2 KB 296 (refd)

Legislation referred to

Legal Profession Act 1976 s 80(1), (2), (8), (13)
Moneylenders Act 1951
National Land Code 1965 s 326, Form 14A

K Nayagam (*Audrey Choong* with him) (*Skrine & Co*) for the plaintiff.
Shaikh Abdul Saleem bin Shaikh Abdul Karim (*Shearn Delamore & Co*) for the defendant.

Abdul Malik Ishak J: This was an originating summons filed by the plaintiff in encl 1 for the following prayers:

(1) A declaration that upon the true and proper construction of an undertaking given by the plaintiffs solicitors, M/s Skrine & Co to the defendant on the 2 June 1989, the defendant is not entitled to be paid the sum of RM22,376.81 and all interest accrued thereon:

(2) An order that the costs of this action be borne by the defendant;

(3) Such further or other relief as this honourable court deems just and proper.

Enclosure 1 was supported by an affidavit affirmed by the plaintiff herself on 19 July 1999 and filed on 22 July 1999 as seen in encl 2. The reply to encl 2 can be seen in encl 6 and this was an affidavit affirmed by Roy Rajasingam on 12 August 1999 and filed on 12 August 1999. The plaintiff affirmed an affidavit in reply in encl 8 in response to encl 6 and encl 8 was affirmed on 22 October 1999 and filed on the same day.

Essentially this judgment focussed on the construction of an undertaking given by a law firm M/s Skrine & Co, the plaintiffs solicitors, to the defendant.

It is appropriate to set out the salient facts of the case.

On 8 August 1985, the plaintiff entered into a sale and purchase agreement with Shukor bin Abdullah (Shukor) wherein the plaintiff agreed to sell and Shukor agreed to buy a property known as QT (R) 5550 LO No 8, Road 1A/71E, Bandar Petaling ('the property'). As the owner of the property and pursuant to the sale and purchase agreement, the plaintiff deposited the original issue document of title of the property with her solicitor by the name of Mr Meredith Coelho (Meredith) of M/s Meredith Coelho & Co Meredith prepared the sale and purchase agreement and initially everything went smoothly. Somehow, Shukor failed to pay the balance of the purchase price in the manner and within the period stipulated in the sale and purchase agreement. The plaintiff had no choice and so she requested Meredith to return the original issue document of title to her. Meredith failed to oblige and not only that Meredith too disappeared from the face of the earth, so to speak. Meredith was not contactable. Alarmed at this turn of event, the plaintiff caused a search to be conducted at the Selangor Darul Ehsan Land Office at Shah Alam and to her dismay, she discovered that the property had purportedly been transferred to Yen Seng Credit and Leasing Sdn Bhd on 7 November 1985. The plaintiff did not

A sign the memorandum of transfer in Form 14A of the National Land Code 1965 ('the NLC') and the plaintiff believed that Meredith had forged her signature. The plaintiff wasted no time. She lodged a police report and entered a private caveat on the property so as to prevent future transactions with the property.

B The plaintiff filed an originating summons in the High Court vide S5–31–3841–87 through M/s Moghan & Co with the intention of recovering the property. An alarming set of circumstances arose. The plaintiff discovered that despite the entry of the private caveat, the property had been transferred from Yen Seng Credit and Leasing Sdn Bhd to Siow Moon Seng. The property too had been charged to Malayan Banking Bhd. The C plaintiff also discovered that the Registrar of Titles, Selangor had cancelled the private caveat pursuant to s 326 of the NLC and it was because of this cancellation that the property was transferred to Siow Moon Seng.

The plaintiff changed solicitors. This time, M/s Skrine & Co took over conduct of the plaintiffs matter. On 20 March 1989, M/s Skrine & Co filed D an action in the High Court of Kuala Lumpur vide civil suit No S5–22–224–89 on behalf of the plaintiff and the civil suit cited Yen Seng Credit and Leasing Sdn Bhd, Siow Moon Seng and the Registrar of Titles, Selangor, Darul Ehsan as the defendants. Unfortunately, proceedings were not filed against Meredith as she had absconded. In due course, the recalcitrant Meredith was struck off the roll of Advocates and Solicitors of the High E Court of Malaya.

The plight of the plaintiff came to the attention of the defendant. As a result of Merediths fraudulent act, the defendant agreed to pay the plaintiff a sum of RM22,396.65 out of its compensation fund subject to the outcome of civil suit No S5–22–224–89. The defendants letter to the plaintiff F conveying this piece of good news was dated 15 March 1989 and it was worded as follows :

Majlis Peguam
Bar Council

Bil Kami: BC/C/54/87

G 15 March 1989

Ms Packiam d/o Ramalingam
No 24, Jalan Belangkas Satu
Kampong Pandan
55100 Kuala Lumpur

H Dear Madam,

Re: Claim against Meredith Coelho

We are pleased to inform that the Malaysian Bar has decided to pay out to you out of the compensation fund the sum of $22,396.65 after adjudication.

However, this payment is subject to the outcome of your court case. In the circumstances, you are to notify to us the outcome of the court case once I it becomes known. You may do this by yourself or through your solicitors. Payment will be made according to the outcome of the said case.

Yours faithfully

Sgd

T Mura Raju
Chairman
Compensation Fund Committee

M/s Skrine & Co responded on behalf of the plaintiff and this response was dated 2 June 1989 and it contained the undertaking advanced to the defendant. The letter was worded thus :

VP/pa/1164275
BC/C/54/87

2 June 1989

Bar Council
5 Jalan Tun Perak
50050 Kuala Lumpur

Dear Sirs

Re: Claim against Meredith Coelho

We act for Madam Packiam a/p Ramalingam and refer to your letter to her of 15 March 1989.

Mr Meredith Coelho appears to have absconded and our client is not pursuing any claim against him. Our client has however, sued certain other persons in connection with Mr Coelhos default but it will take some time before the case is heard.

We write therefore to ask that you pay the compensation due to our client forthwith on our undertaking that if our client is successful in the case filed, we will ensure that the order obtained includes an order for payment of an equivalent sum back to the Malaysian Bar from any money recovered from the suit so that our client will not obtain double recovery.

Yours faithfully,

cc client

By letter dated 17 October 1989, the defendant swiftly acted and enclosed a cheque for the sum of RM22,376.81 and at the same time stated that it was strictly pursuant to the undertaking given by M/s Skrine & Co. It was said that out of the sum of RM22,376.81, a sum of RM5,000 had been retained towards disbursements while a sum of RM17,376.81 had been paid to the plaintiff. That letter was worded in this way:

Majlis Peguam
Bar Council

VP/pa/1164275

BC/C/54/87

Messrs Skrine & Co
Advocates & Solicitors
Straits Trading Building
No 4, Leboh Pasar Besar
50050 Kuala Lumpur

Dear Sirs,

Re: Claim against Meredith Coelho By Madam Packiam a/p Ramalingam

We refer to your letter dated 2 June 1989 and enclose herewith a HSBC cheque No 624933 for $22,376.81 being the grant to your client as claimant and this grant is made strictly pursuant to the undertaking given by you in the third and last paragraph of your letter under reply.

Kindly acknowledge receipt.

Yours faithfully
Sgd

T Mura Raju
Chairman
Compensation Fund Committee

Encl:
MR/jn

Civil suit No S5–22–224–89 did not proceed to trial. The matter was settled out of court on 23 October 1996. Out of that settlement, the plaintiff obtained a sum of RM150,000 inclusive of costs and interest provided that the civil suit No S5–22–224–89 be discontinued. The plaintiff was advised by her solicitors that in the light of the fact that the standard of proof required would be on the high side beyond reasonable doubt, it would be difficult to prove the case especially with the disappearance of Meredith. It was said that the property was then valued at approximately RM330,000 and so the settlement sum was said to be considerably less, far lesser than the real value of the property. It is interesting to note that the handwritten settlement as reflected in exhibit PR 5 of encl 2 did not say that the settlement sum of RM150,000 was inclusive of costs and interest. That handwritten settlement in the handwriting of Mr Vinayak Pradhan was worded thus :

KL High Court Suit No S5–22–224–89

We confirm settlement on the following terms:

(1) The second defendant Siow Moon Seng will pay a sum of RM150,000 to the plaintiffs solicitors M/s Skrine & Co upon which event the plaintiff will cause the caveat to be discharged.

(2) The date of such payment will be notified by Friday 25 October and is expected to be in about two weeks time.

(3) Siow will be entitled to all rent and benefits of the property accruing after the date of making the said payment.

(4) The plaintiff upon such payment will notify the existing tenant that Siow is the rightful owner of the said property.

(5) Upon such payment the plaintiff will discontinue the action against all the defendants with no order as to costs.

Sgd

Vinayak PradhanJasmeetpal Singh
Counsel for plaintiff Counsel for first and second defendants

Sgd

Nik Suhaimi bin Nik Sulaiman
B/p Penasihat Undang-Undang Negeri Selangor
b/p Defendan Ketiga

It was deposed that the sum of RM150,000 was paid to the plaintiffs solicitors on 11 November 1996. The plaintiffs solicitors then placed the sum of RM150,000 in a fixed deposit account on 25 November 1996 and the interest earned came up to RM4,586.19. A sum of RM125,747.68 was released to the plaintiff on July 28, 1997 after deducting the initial sum of RM150,000 and the interest earned thereon. The sum of RM22,376.81 was retained by the plaintiffs solicitors for disbursement purposes and this very sum was held by the plaintiffs solicitors in a fixed deposit account at RHB Bank Berhad, Wisma UOA Damansara.

M/s Skrine & Co held the view that the settlement out of court did not come within the parameters of the terms of the undertaking that was given on 2 June 1989 and M/s Skrine & Co expressed their desire to release the sum of RM22,376.81 to the plaintiff unless the defendant objected to it. All these were incorporated by M/s Skrine & Co in their letter to the defendant dated 20 November 1996 as seen in exh PR 6 of encl 2 and that letter was worded thus:

VP/pa/1164275BC/C/54/87

20 November 1996

Bar Council
5 Jalan Tun Perak
50050 Kuala Lumpur

Dear Sirs

Re: Claim Against Meredith Coelho by Madam Packiam a/p Ramalingam

We act for Madam Packiam a/p Ramalingam.

Madam Packiam received a sum of RM22,376.981 from the compensation fund in respect of a claim she had against Mr Meredith Coelho.

Copies of your letter of 15 March 1989, our letter of 2 June 1989 and your letter of 17 October 1989 are enclosed herewith for your ease of reference.

Madam Packiam filed proceedings, inter alia, against the proprietor of the property who had bought the property from another person who had obtained it from Coelho. The matter was settled on our advice with Madam Packiam obtaining partial reimbursement of her loss and on terms that the action be discontinued. In the circumstances, she has not been fully compensated. If proceedings had been taken against Coelho (who has absconded) there seems to be no doubt that Madam Packiam would have obtained payment of a further sum well in excess of RM22,376.81 paid to her. In these circumstances we do not consider that Madam Packiam was successful in the case filed and she has certainly not obtained total recovery.

We are therefore intending to release the sum of RM22,376.81 to Madam Packiam unless you have objection to this in which event we shall have to consider the best means of resolving such a dispute. Could you please

let us have your response as soon as possible. If there is any clarification you require, our Mr Vinayak Pradhan will provide it.

Yours faithfully,

ccMadam Packiam a/p Ramalingam

When the defendant came to know that the plaintiff had settled Civil Suit No S5–22–224–89 out of court for a sum of RM150,000, the defendant sought for a refund of RM22,376.81 inclusive of interest. This was what the defendant said by letter dated 26 September 1997:

Majlis Peguam

Bar Council Malaysia

VP/KN/pa/1164275
BC/C/54/87(1)

26 September 1997

Messrs Skrine & Co
Advocates & Solicitors
Unit 50-8-1, 8th Floor
Wisma UOA Damansara
50 Jalan Dungun, Damansara Heights
50490 Kuala Lumpur

Dear Sirs

Re: Claim against Meredith Coelho by Madam Packiam a/p Ramalingam

I refer to your letter dated 30 December 1997 which was considered by the compensation fund committee at its meeting held on 19 September 1997.

In view of the fact that the claimant had recovered RM150,000 inclusive of costs and interest, the Bar Council is of the view that the sum of RM22,376.81 should be paid back to the Bar Council inclusive of interest accrued thereon.
It will be appreciated if you would kindly let us have your cheque on an urgent basis.

Thank you.

Yours faithfully

Sgd
Catherine Eu
Executive Director

The plaintiffs stand was rather simple. She was cheated by Meredith, a practising advocate and solicitor of the High Court of Malaya. She was also deprived of the opportunity to take legal action against Meredith, who has since disappeared. She had difficulty to prove her case referring of course to the civil suit No S5-22-224-89. She took exception to the stand adopted by the defendant to the effect that she was not entitled to be compensated for the losses which she sustained as a result of the fraudulent actions of Meredith a member of the Malaysian bar, at the material time. She believed that the circumstances that led to the settlement out of court would bring it

outside the terms of the undertaking that was given by M/s Skrine & Co on 2 June 1989. She believed that it was inequitable and unconscionable for the defendant to seek the refund of RM22,376.81 together with interest thereon.

Roy Rajasingam deposed that the plaintiff had managed to secure a full recovery from the settlement agreement and he was of the view that it would be inequitable and unconscionable for the plaintiff to retain the sum of RM22,376.81 as that would amount to double recovery. He too was of the view that the plaintiff should not be entitled to abuse the privilege granted to her as that would run counter and be contrary to the interests of the public.

By s 80(1) of the Legal Profession Act 1976 the Malaysian Bar shall maintain and administer a fund known as the compensation fund. It is a noble gesture. Every advocate and solicitor on securing a Sijil Annual shall contribute to the Compensation Fund as determined, from time to time, by the Bar Council. Section 80(2) of the Legal Profession Act 1976 enacts as follows:

> Every advocate and solicitor shall on each occasion he applies for a Sijil Annual pay to the Malaysian Bar a contribution of such sum as the Bar Council may from time to time determine and the Malaysian Bar shall pay that contribution into the Fund:
>
> Provided that an advocate and solicitor who applies for a Sijil Annual shall be required to pay only half the contribution so determined if the practising certificate for which he proposes to apply is valid for less than six months.

Of crucial importance would be s 80(8) of the Legal Profession Act 1976. It enacts as follows:

> Where it is proved to the satisfaction of the Bar Council that any person has sustained loss in consequence of dishonesty on the part of any advocate and solicitor or any clerk or servant of an advocate and solicitor in connection with that advocate and solicitors practice in Malaysia as an advocate and solicitor, or in connection with any trust of which that advocate and solicitor is a trustee, then subject to this section, the Malaysian Bar may, if the Bar Council thinks fair and reasonable, make a grant to that person out of the Fund for the purpose of relieving or mitigating that loss.

and clearly the purpose would be to relieve or mitigate the loss. The release of the money to the plaintiff was considered fair and reasonable by the defendant and there was no necessity for the plaintiffs solicitors M/s Skrine & Co to give that kind of undertaking as they did in their letter dated 2 June 1989. The money from the compensation fund was more in the nature of a charity to tide the difficulty faced by the plaintiff and it should be an outright gift to the plaintiff. But alas, M/s Skrine & Co thought it fit to give an undertaking.

I have to marshall my thoughts and address my attention to the letter of undertaking dated 2 June 1989 and having done so and having construed it in the light of the surrounding circumstances, I ruled that that letter of undertaking was in fact a letter of undertaking. In my judgment, the

undertaking was sufficiently clear; it was free from any material ambiguity and it was, pure and simple, an undertaking given by M/s Skrine & Co to the defendant (*John Fox v Bannister; King & Rigbeys* [1988] 1 QB 925 at p 929). A personal undertaking given by a solicitor in his professional capacity to the client (*Re A Solicitor; ex p Hales* [1907] 2 KB 539 at pp 544–545) or to a third person (*Re Gee* (1845) 2 Dow & L 997; and *Re A Solicitor* [1966] 3 All ER 52, [1966] 1 WLR 1604) or to the court in the course of proceedings (*D v A & Co* (1900) 1 Ch 484; and *Re Williams* (1850) 12 Beav 510) may be enforced summarily upon application to the court (*Re FC* (1888) WN 77; *United Mining and Finance Corp Ltd v Becher* [1910] 2 KB 296 (DC); *Jonesco v Evening Standard Co Ltd* [1932] 2 KB 340 at p 342 (CA); *Pott v Stutely* (1935) WN 140; and *Re A Solicitor* (1969) 113 Sol Jo 549 (DC)).

An undertaking may be described in many ways. Bluntly put, it is an unequivocal declaration of intention addressed to someone and that someone places reliance on it. It must be emphasized that the undertaking must be given by the solicitor and not as an individual (*Walker v Arlett* (1831) 1 Dowl 61; *Northfield v Orton* (1832) 1 Dowl 415; *Ex p Watts* (1832) 1 Dowl 512; *Re Bateman* (1833) 2 Dowl 161; *Ex p Clifton* (1836) 5 Dowl 218; *Re Kearns* (1847) 11 Jur 521; and *Allaway v Duncan* (1867) 16 LT 264) and that undertaking must be given in the solicitors professional capacity as a solicitor (*Re Gee* (1845) 2 Dow & L 997; *United Mining and Finance Corp Ltd v Becher* [1910] 2 KB 296 at p 307D; and *Silver and Drake v Baines* [1971] 1 QB 396, [1971] 1 All ER 473 (CA)). Here, the undertaking was given by a law firm M/s Skrine & Co and it carried more weight. The undertaking must have been drafted by Mr Vinayak Pradhan because his initial VP appeared at the top right hand column of the letter of undertaking. I venture to say that an undertaking by a partner is certainly binding on his firm (*Alliance Bank v Tucker* (1867) 17 LT 13) provided the partner was acting within his authority when he gave that undertaking (*Hasleham v Young* (1844) 5 QB 833).

There was nothing in the affidavit to show that the undertaking was mistakenly given. No solicitor from the law firm of M/s Skrine & Co deposed an affidavit in support of encl 1. The plaintiff played a pivotal role in this originating summons because she affirmed two affidavits. Be that as it may, as I said the undertaking given by M/s Skrine & Co was very clear in its terms (*Thomson v Gordon* (1846) 15 M & W 610). To me, the undertaking given by M/s Skrine & Co was not impossible ab inito to perform (*Peart v Bushell* (1827) 2 Sim 38; *United Mining and Finance Corp Ltd v Becher* [1910] 2 KB 296 at p 306 (DC); *Silver and Drake v Baines* [1971] 1 QB 396, [1971] 1 All ER 473 (CA); and *Udall v Capri Lighting Ltd* [1988] QB 907, [1987] 3 All ER 262 (CA)).

What was the undertaking in the present case? As reproduced earlier the undertaking was worded thus:

> We write therefore to ask that you pay the compensation due to our client forthwith on our undertaking that if our client is successful in the case filed, we will ensure that the order obtained includes an order for payment of an

> equivalent sum back to the Malaysian Bar from any money recovered from the suit so that our client will not obtain double recovery.

The root word would be affixed to the word successful. Would a settlement arrived at out of court be deemed successful? The *New Shorter Oxford English Dictionary on Historical Principles*, edited by Lesley Brown, Vol 2 at p 3127 defines the word succeed as follows:

> With reference to success. Have the desired outcome, have a favourable result, turn out successfully. Of a plant : grow well, thrive. Achieve a desired end; be successful in an endeavour, manage to do something; prosper. Have a specified outcome, achieve a specified end; turn out or manage well. Give success to; prosper, further.

In my judgment, the settlement out of court must be considered a success bearing in mind that if the civil suit No S5–22–224–89 were to proceed for trial it would be difficult for the plaintiff to garner success in view of the heavy burden placed on the plaintiff. There was no requirement at all in the letter of undertaking that the word successful should be read after adjudication. In *Peoples Parkway Development Pte Ltd v Ramanathan Yogendran* [1991] 1 MLJ 325, the Singapore High Court had occasion to consider the issue of solicitors undertaking in the context of the undertaking by the solicitor in regard to a tenancy agreement. The facts of that case may be stated as follows. There the plaintiffs sought to enforce an undertaking given by the defendant, a solicitor, in relation to a dispute between the plaintiffs and the defendants clients over a tenancy agreement. The defendant had given an undertaking to the plaintiffs to pay a maximum sum of S$100,000 on account of rent and service charges for the period 1 June 1986 to 14 October 1986 which may be ordered against the defendants clients on final adjudication of the rental dispute. The clients had difficulties paying rent and service charges under the tenancy agreement and surrendered the premises to the plaintiffs in April 1987. On 7 May 1987, the plaintiffs, with the defendants consent, instituted an action against the clients claiming, inter alia, rent and service charges for the period 1 June 1986 to 14 October 1986. The clients filed a defence but was subsequently wound up upon a petition presented by one of its creditors. The plaintiffs solicitors corresponded with the official receiver and liquidator of the clients who replied that he had no objection to the plaintiffs proceeding with the action against the clients and that he would consent to judgment with no costs against the clients. The plaintiffs subsequently obtained a consent judgment against the defendants clients. The defendant was not informed nor served with the application. The plaintiffs sued the defendant to enforce the undertaking. The issue was whether the dispute in respect of which the undertaking was given has been finally adjudicated. The letter from the plaintiffs then solicitor to the defendant dated 22 September 1986 was worded thus:

> *Re: Unit 01-01/02 Parkway Builders Centre*
>
> Following discussions between the principals of our respective firms on 19 September 1986, the following terms were agreed in relation to the tenancy of the above mentioned premises (`the premises) subject to our respective clients confirmation:

(1) The dispute between our respective clients on whether the tenancy runs from 1 June 1986 as previously agreed or 15 October 1986 (as your clients now claim it should be) shall be referred to adjudication in the subordinate courts within 14 days of your clients providing the security hereinafter referred to.

(2) Your clients shall provide to our clients security of $100,000 to account of rent and service charge for the period 1 June 1986 to 15 October 1986. At your clients request, our clients have agreed to your firm giving our clients an undertaking to pay up to a maximum sum of $100,000 on account of rent and service charge which may be ordered to be paid to our clients on the final adjudication of the matter referred to in cl 1 above. After final adjudication, your firm shall pay our clients forthwith on demand the sum ordered by court to be paid to our clients as rent and service charge.

In reply, the defendant telexed to the plaintiffs then solicitor, the following:

Re: 0-01/02 Parkway Builders Centre

Yr tlx dd 22 September 1986 refers.

We confirm tt our firm will provide an undertaking to u as agents of Peoples Park Development Ltd to pay to a maximum sum of $100,000 on a/a of rent n service charges which may be ordered agst our clt on final adjudication in respect of the rental dispute arising from agmt of 5 March 1986 for the period from June 1986 to 14 October 1986.

We also confirm the following:

(1) We will transfer the present dispute for adjudication to the sub-cts if the law allows it within 14 days.

We r of the view tt this is more than sufficient for yr clts to open the premises by 5pm today, failing which our undertaking ceases n we will (have) no choice but to litigate.

Thean J who heard the case held that the expression final adjudication of the dispute does not mean a mere pronouncement or recording of a judgment. It meant, according to Thean J, a consideration and determination of the dispute, involving the court exercising its mind on the dispute, examining the evidence, whatever may be the form of evidence, whether viva voce or affidavit evidence, applying the relevant law and finally giving a decision or judgment on the dispute (see page 329 of the report). The consent judgment which the plaintiffs obtained against the defendants clients was held not to be an adjudication of the dispute.

Factually, the case of *Peoples Parkway Development Pte Ltd v Ramanathan Yogendran* are poles apart from our case. Here, there was no reference at all to final adjudication in the undertaking extended by M/s Skrine & Co to the defendant. Without the need of a final adjudication, there was no necessity of a trial and an out of court settlement was sufficient to satisfy and come within the purview of success. Would not the plaintiff be said to be successful when she received RM150,000.00 by way of an out of court settlement? The answer would certainly be in the positive.

The English Court of Appeal in *Bentley & Anor v Gaisford & Anor* [1997] 2 WLR 401 had occasion to consider the issue of an undertaking between solicitors. Factually, in that case both the plaintiffs and the

defendants were solicitors. The plaintiffs acted in arbitration for a client who terminated their retainer and instructed them to send all documents relevant to the arbitration to the defendants. The plaintiffs made the documents available on the defendants undertaking to hold the documents/our file to our order in respect of outstanding fees/disbursements but no express restriction was placed on the use the defendants might make of them. The defendants, acting in good faith and in pursuance of what they regarded to be their duty to the clients, copied all the documents and sent the copies to the clients, thereby rendering the plaintiffs lien for unpaid fees effectively worthless. The plaintiffs, whose fees of some £14,550 remained unpaid, brought an action against the defendants for breach of the undertaking to hold the documents to their order; seeking the delivery of the documents and any copies, an injunction restraining the defendants from making any use of them and compensation for breach of the undertaking. The judge dismissed the action on the ground that, since the defendants had not undertaken not to copy the documents, they were not in breach of their undertaking in so doing. On appeal by the plaintiffs and allowing the appeal (Roch and Henry LJJ; Sir Richard Scott VC dissenting), the Court of Appeal held that, when a solicitor transferred a clients documents over which he possessed a lien for unpaid fees to another solicitor to be held to the first solicitors account or order, the use the second solicitor could make of them was impliedly limited so as to preserve to the first solicitor the maximum security which was not inconsistent with the progress of the clients litigation; that, accordingly, the copying of the documents and despatch of the copies to the client, in the absence of evidence that was necessary for the purposes of the arbitration, was a breach of the defendants undertaking to hold the documents to the plaintiffs order since it effectively destroyed the value of the plaintiffs security; but that, in all the circumstances, although the plaintiffs were entitled to a declaration that the defendants were in breach of their undertaking, it was pointless to order the defendants to deliver up the documents or the copies or to grant an injunction restraining their use, nor was it appropriate to order the payment of compensation, since the conduct of the defendants had not been inexcusable or such as to merit reproof.

In *Re Choe Kuan Him, Advocate & Solicitor; T Damodaran v Choe Kuan Him* [1976] 2 MLJ 207 (FC), Suffian LP at p 209 had this to say in regard to solicitors undertakings generally:

> The law and practice relating to solicitors undertakings in Malaya in my opinion is the same as that in England.
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> Mr Choe is an officer of the court and we should compel him to honour undertakings by him promptly to secure public trust and confidence in the legal profession which is an ancient and honourable one, and the language used by Mr Choe in this undertaking is clear, unambiguous and unqualified and that any one reading it cannot but get the impression that Mr Choe undertook to release the money in his hand the moment the lands had been transferred into the name of the Alor Merah Sdn Bhd or its assignees. But I respectfully agree with the learned judge in the court below that in the peculiar circumstances of this case Mr Choe should be allowed to release it into court,

as he requests, and not to the vendor-applicant. I agree with Mr Jayadeva for Mr Choe that the undertaking should be considered not in isolation, but in the light of the sale agreement and the assignment.

Suffian LP was delivering the majority decision with Wan Suleiman FJ concurring. Ali FJ in his dissenting judgment in the same case referred to some authorities and this was what he said at p 210 of the report:

> The English law on summary enforcement of solicitors undertakings as stated on p 195 of 36 *Halsburys Laws of England* (3rd Ed) is as follows:
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> 266 Enforcement of undertakings. Where a solicitor, who is acting professionally for a client, gives his personal undertaking in that character to the client, or to a third person, or if the undertaking is given to the court in the course of proceedings, that undertaking may be enforced summarily upon application to the court.
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> In *Re A solicitor; ex p Hales* [1970] 2 KB 539 it was held thus:
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> Where a solicitor in the course of legal proceedings makes a statement to a person even though not his client, that funds have been put into his hands for the purpose of payment to that person upon a certain event happening, and that upon the happening of the event he will pay the money, the personal undertaking of the solicitor is sufficient to enable the court to exercise its summary jurisdiction to compel him to carry out the undertaking on the application of the person to whom it is given, although it is not a personal guarantee in the sense that the solicitor guarantees the payment of the money out of his (the solicitors) own pocket.
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> Quite apart from these citations reference has also been made to the Guide by the English Law Society 1974 which makes it abundantly clear that that an undertaking by a solicitor stands on a special footing in view of his special position under the law. The utmost reliance is placed on any promise or undertaking which he makes either to members of the public or the court. Failure to honour the promise or undertaking is regarded in law as professional misconduct. Under s 26 of our Advocates and Solicitors Ordinance 1974 the High Court having power of control over Advocates and Solicitors can order them to be struck off the Roll or suspended from practice for gross misconduct. In my opinion there is no difference between the law in England and here.

Going into the crux of the matter, Ali FJ succinctly said in the later part of his judgment at the same page the following:

> As for the reasons given by the learned judge I must respectfully say that the civil action between Mr Vasudevan and the appellant has no relevance whatsoever to the issue in the present proceedings. The issue was whether the respondent as a solicitor was liable for the breach of his undertaking. The undertaking was given on his own initiative.
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> His reason for giving it was obviously to assure the appellant that on the transfer of the lands being completed he would be paid the balance of the purchase price. It was the logical thing to do as the balance had already been deposited with the respondent.
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> Such assurance coming from a solicitor, as it were, would leave the appellant in no doubt that it would be honoured once the transfers were completed. But the respondent did not honour his words or undertaking. He

tried to put up all sorts of excuses for not doing so. In one breath he brought up the question that the lands are not free from encumbrances in view of a lis pendens order obtained by Mr Vasudevan. In another he said in paragraph 10 of his affidavit affirmed sometime in March 1975 that if the balance of the purchase price was to be paid to the appellant his clients, the purchasers, would stand to lose the money as the appellant is not a person of means. He asked the court to order the amount to be deposited into court. Nothing that was said could have any relevance to the issue before the court which was concerned only with his misconduct and his liability to carry out the undertaking.

Before the Privy Council, the matter was re-agitated. In *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267, Lord Diplock delivering the judgment of the Board, aptly said at p 268 of the report:

> The terms of the solicitors undertaking are clear, unqualified and unequivocal. The event on the happening of which the money was to be paid took place on 16 April 16 1974, when the transfer of the lands was duly registered in the name of the purchaser M/s Syarikat Alor Merah Sdn Bhd. The failure to pay the balance of $182,200 is, on the face of it, a plain breach of the undertaking. There would seem to be no reason why in the instant proceedings, commenced on 30 July 1974, by originating summons against the solicitor to enforce the undertaking, the vendor should not recover judgment for the balance of $182,200 with interest from 16 April 1974.

All these authorities serve as mere guidelines. At the end of the day, it was entirely up to me to decide whether to grant encl 1.

To say that the settlement out of court was outside the purview of the undertaking would certainly be perverse and would pervert the course of justice. Here was an undertaking that was very clear in its terms. There was no necessity for adjudication and there was no need to proceed to full trial in order to be successful in the plaintiffs endeavour in regard to Civil Suit No S5–22–224–89. In drafting the settlement out of court, why was there no attempt to incorporate the requirement for payment of an equivalent sum back to the Malaysian Bar so that the plaintiff will not obtain double recovery. This could have been done, after all the letter of undertaking was drafted on 2 June 1989 whereas the terms of settlement out of court was prepared on 23 October 1996 as reflected at para 12 of encl 2. There was no affidavit evidence to show that what had happened was a mere oversight or a mistake and I am not prepared to enter into unchartered waters.

On 17 October 1989, when the defendant transmitted the cheque for RM22,376.81 to M/s Skrine & Co for onward transmission to the plaintiff, the defendant merely referred to the undertaking advanced by M/s Skrine & Co. Some years down the line, to be precise on 26 September 1997, when the defendant wrote to M/s Skrine & Co for the return of RM22,376.81, the defendant became greedy because the defendant sought the return of that sum inclusive of interest accrued thereon. I wonder whether the defendant has embarked on a money lending activity under the Moneylenders Act 1951. Section 80(13) of the Legal Profession Act 1976 proudly enacts, inter alia, that the income derived from the compensation fund shall be exempted from income and all other taxes and there was thus no necessity to demand

A interest from M/s Skrine & Co For fear of repetition, it would be germane to say that in disbursing money out of the compensation fund for the purpose of relieving or mitigating the loss of the plaintiff as a consequence of dishonesty on the part of Meredith, the money should be given outright as a way of appeasing the plaintiff for the incorrigible conduct of Meredith an advocate and solicitor of the High Court of Malaya. That should have B been the attitude of the defendant and if that attitude prevailed and was made known, M/s Skrine & Co would not have given the undertaking as they did in the letter dated 2 June 1989.

Be that as it may, I must adjudicate encl 1. For the reasons advanced in this judgment, encl 1 was dismissed forthwith. Messrs Skrine & Co must C abide by their undertaking to the defendant. An undertaking once given, the full rigours of the law will be brought to bear upon it. There should be no order as to costs.

Application dismissed.

D Reported by Benjamin Yong

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